Supreme Court, U.S.
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No. 02-367

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF[1]

This case squarely presents for the Court's review the important, frequently recurring question of whether FIFRA pre-empts farmers from bringing agricultural crop injury suits that challenge the content of EPA-approved product labeling – here, labeling which explicitly authorized use of the on-the-farm, pesticide "tank mix" combination that Respondents allege harmed their peanut crop. Earlier this week the Court denied review in *Netland v. Hess & Clark*, 284 F.3d. 895 (8th Cir. 2002), *cert. denied*, ___ U.S.L.W. ___ (Oct. 15, 2002), a personal injury case involving pesticide *misuse* in which the Eighth Circuit had reaffirmed the well settled principle – recognized by eight other federal circuits and numerous state appellate courts – that § 136v(b) of FIFRA expressly pre-empts labeling-related requirements imposed by state law damages claims. The Court's denial of review in *Netland*, while not surprising in view of the virtual unanimity among the lower courts on the question there presented, in no way detracts from the need for review of the quite different issue presented in this case. Only this Court can resolve the intolerable conflict created by the Texas Supreme Court's opinion below that labeling-related claims involving agricultural crop injury are exempt from pre-emption.

I. THE COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

1. In every practical way the opinion below is a "final judgment" for purposes of 28 U.S.C. § 1257. "The

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[1] The Rule 29.6 corporate disclosure statement filed with the petition remains accurate.

federal issue" involved in this appeal – whether FIFRA pre-empts Respondents' agricultural crop injury claims – "has been finally decided" by the Texas Supreme Court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482 (1975). The state supreme court unequivocally held that Respondents' "claims are not preempted" given that they involve agricultural crop injury, a subject supposedly unregulated by EPA or FIFRA. Pet. App. A at 2a. As a result, "[t]his case has been remanded by the state supreme court to the district court for trial on the merits." Opp. at 3.

If this Court grants the petition for certiorari and holds, contrary to the opinion below, that FIFRA pre-emption of labeling-related damages claims extends to suits involving agricultural crop injury, this litigation will be over. "[R]eversal of the state court on the federal issue would be preclusive of any further litigation" because the Texas Court of Appeals (like the state trial court) already has found, after considering the parties' arguments and evidence, that "*[a]ll* of plaintiffs' state law claims *relate directly or indirectly to the product label* stating that the herbicides may be combined by tank mixing." *Cox*, 420 U.S. at 482; Pet. App. B at 16a (emphasis added).[2]

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[2] The court of appeals treated the subject of whether Respondents' claims are labeling-related as a factual issue. It based its finding that all of the claims are labeling-related on "the summary judgment proof show[ing]" that "plaintiffs relied upon off-label magazine and brochure advertisements made by defendant [American Cyanamid] regarding Prowl and Pursuit;" that "[t]hese advertisements stated that 'PURSUIT can be tank mixed with other popular products such as PROWL herbicide;' " that "[t]he Pursuit labeling specifically stated that Pursuit and Prowl may be combined by tank mixing;" and hence, that "[t]he off-label statements merely repeated information on the labels." Pet. App. B at 15a-16a & 16a n.2.

Under the Texas Constitution, this factual finding by the state court of appeals "shall be conclusive," and therefore, cannot be reviewed by the Texas Supreme Court. Texas Const. Art. V, sec. 6(a) ("the decision of said courts [of appeals] shall be conclusive on all questions of fact brought before them on appeal or error") (App. at 1a); *see generally Leitch v. Hornsby*, 935 S.W.2d 114, 120 (Tex. 1996) (Abbott, J., concurring) ("This provision 'restrict[s], in express terms, the jurisdiction of the [Texas] supreme court, and . . . confine[s] it to questions of law.' ") (quoting *Choate v. San Antonio & A.P. Ry. Co.*, 44 S.W. 69, 69 (Tex. 1898)); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 40 & n.15 (Tex. 1994) (internal quotation omitted) (citing the "narrow type of review permitted this [Texas Supreme] Court by the Texas Constitution" and noting that the "[Texas] Supreme Court is not invested with the power to determine facts"); *Herbert v. Herbert*, 754 S.W.2d 141, 143 (Tex. 1988) (Article V, section 6 of the Texas Constitution "was designed to remove fact jurisdiction from the [Texas] supreme court"); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045, 1139 (1993) (Article V, section 6 "acts as a limitation on the judicial authority of the [Texas] supreme court and confines its jurisdiction to questions of law.").[3]

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[3] In an effort to distinguish this case from *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995) (holding that FIFRA pre-empts all common law claims relating directly or indirectly to labeling), Respondents attempted to argue in the Texas Supreme Court that "the court of appeals erred in holding that all of their claims related directly or indirectly to the product label." Opp. at 2. The opinion below, however, does not, and under Art. V, sec. 6(a) of the Texas Constitution could not, disturb the court of appeals' finding. Instead, the opinion below indicates that the "fundamental difference" between the two cases is that "*Quest* involved

(Footnote cont'd on next page.)

Thus, contrary to Respondents' assertion, if this Court were to grant review and reverse the opinion below, the Texas Supreme Court would *not* then "be called upon further to determine" which of their claims are labeling-related. Opp. at 4. There would be no Texas Supreme Court "decision on remand." *Id.* Instead, because the state court of appeals already has conclusively found that all of Respondents' claims are labeling-related, there would be nothing left for the Texas Supreme Court to do other than order dismissal of the case. Indeed, this is one of the reasons why this case is an excellent vehicle for the Court's review.[4]

2. Respondents also argue that *Cox* is inapplicable, and that the Court should refrain from exercising its § 1257 jurisdiction, because "the potentially serious erosion of federal policy – is totally absent" from this case. Opp. at 9. They denigrate to "relative insignificance" Congress' steadfast and unambiguous mandate, reflected in the text and title of § 136v(b) of FIFRA ("Uniformity"), and in its legislative history, that each pesticide product be accompanied by nationally uniform labeling whose content is regulated solely by EPA, and not by the States. *Id.* at 7; *see* Pet. at 14-15, 18 (discussing § 136v(b) and its legislative

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(Footnote cont'd from previous page.)

a claim for personal injury while this case involves a claim for target crop damage." Pet. App. A at 13a.

[4] Respondents concede that at least some of their claims are labeling-related. *See* Opp. at 1-2. Under *Cox*, that is enough to invoke the Court's § 1257 jurisdiction since "reversal of the state court on the federal [pre-emption] issue would be preclusive of any further litigation *on the relevant cause[s] of action*" (i.e., on any and all labeling-related causes of action). 420 U.S. at 482-83.

history); Brief of CropLife America as *Amicus Curiae* in Support of Petitioner at 1, 4, 14-15, 16 n.9 & n.10, 18-19.

The importance to industry, farmers, and the public of the national labeling uniformity mandated by § 136v(b) cannot be overstated. Uniformity of labeling is an integral part of the " 'coordinated Federal-State administrative system" that Congress established "to carry out [FIFRA's] program.' " *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 615 (1991) (quoting H.R. Rep. No. 92-511, at 1-2 (1971)). As this Court has recognized, "[l]abeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." *Id.* Nationally uniform product labeling promotes the safe and effective usage of pesticides, and is essential for maintaining the integrity of EPA's determinations regarding the labeling of pesticides. *See New York Pesticide Coalition v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989) (internal quotation omitted) (§ 136v(b) "has as its main focus . . . preserving the force of the information contained in the FIFRA label").

There is no question that this case implicates important federal interests, and thus satisfies the requirement of *Cox's* fourth category that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 483; *see* CropLife America *Amicus* Br. at 5 n.3 (explaining that under *Cox*, "[i]t is enough that important federal interests are *implicated*"). Indeed, as CropLife America discusses in its *amicus curiae* brief, this Court frequently has exercised jurisdiction under § 1257 to grant immediate review of state supreme court decisions (like the opinion below) which, if left undisturbed, have the potential to seriously erode federal policies – such as national uniformity – underlying federal pre-emption provisions. *See* CropLife America *Amicus* Br. at 4-8; *see also* Pet. at 21-22.

Respondents assert that the opinion below "will not impair" the federal policy of national labeling uniformity

because the regulatory effect of state damages awards against pesticide manufacturers for labeling-related claims is "mere supposition." Opp. at 7, 8. To the contrary, this Court repeatedly has held that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and *controlling policy*." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)) (emphasis added). Thus, Respondents' argument that

> the liable party is not "required" to change his label by a damage award . . . is sophistry. If plaintiffs could recover large damage awards because the herbicide was improperly labeled under state law, the undeniable practical effect would be that state law *requires* additional labeling standards not mandated by FIFRA.

MacDonald v. Monsanto Co., 27 F.3d 1021, 1025 (5th Cir. 1994).

II. THE OPINION BELOW CREATES AN IRRECONCILABLE SPLIT OF AUTHORITY ON AN IMPORTANT FEDERAL QUESTION THAT AFFECTS FARMERS, PESTICIDE MANUFACTURERS, AND THE PUBLIC

The overarching federal question presented by this appeal is whether FIFRA pre-empts failure-to-warn and other labeling-related state law damages claims involving agricultural crop injury. Conceding that "many jurisdictions . . . have reached the *opposite* result," the Texas Supreme Court categorically held that such claims are not pre-empted. Pet. App. A at 12a (emphasis added). Indeed, the California Supreme Court reached *exactly* the opposite result in

Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000). And the U.S. Court of Appeals for the Fifth Circuit (consistent with four other federal circuits) reached *exactly* the opposite result in *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999). *See* Pet. at 9-12.

Respondents assert, however, that "the decision below does not present a conflict." Opp. at 9. In a futile effort to support this erroneous contention, they argue that "the Texas Supreme Court's opinion addressed an issue of first impression." Opp. at 11. To the contrary, the Texas Supreme Court addressed the *same* question as the California Supreme Court and the Fifth Circuit. That question is whether FIFRA pre-empts labeling-related damages claims alleging agricultural crop injury due to the toxic effects of pesticides ("phytotoxicity"). Yet, the Texas Supreme Court reached a *diametrically conflicting* legal conclusion on this question.

Even if, as Respondents assert, the opinion below relies upon an "essential distinction" (the supposed distinction between "phytotoxicity" and "target area phytotoxicity") which *Etcheverry*, *Andrus*, and other cases overlook, that would *not* make this a case of "first impression" that "cannot be in conflict with *Etcheverry, Andrus*, or the prior decision of any other Court." *Id.* at 11 (quoting Pet. App. at 12a). Instead, the Texas Supreme Court's conflicting FIFRA pre-emption analysis and conclusion only underscore the split of authority and the need for this Court's immediate review to resolve the conflict.

Moreover, the conflict created by the Texas Supreme Court's opinion transcends labeling-related crop injury claims alleging phytotoxicity. The opinion below also authorizes Texas farmers to file labeling-related state court damages suits that allege crop injury due to the ineffectiveness (i.e., lack of efficacy) of FIFRA-registered

pesticide products in controlling weeds, insects, or other types of pests. It also raises the prospect of personal injury suits involving alleged risks for which EPA may not impose labeling requirements at the time of initial product registration. *See* Pet. at 22; CropLife America *Amicus* Br. at 18-19.

The arguments in Respondents' opposition as to why the Texas Supreme Court's opinion is "correct" – in other words, why *Etcheverry*, *Andrus*, and other crop injury cases supposedly are wrong – only highlight the conflict and need for this Court's review. Opp. at 12. For example, in an attempt to defend the opinion below on the merits, Respondents' opposition argues that "[t]he extent of the EPA's exercise of its discretionary authority [to require manufacturers to submit efficacy data if problems develop after a pesticide is registered] is overstated by the *Etcheverry* court." *Id.* at 13-14. EPA's post-registration regulation of labeling to prevent crop damage (due to either phytotoxicity or lack of efficacy) is a point which the California Supreme Court emphasized in *Etcheverry*, but which the Texas Supreme Court's opinion completely ignores. *Compare Etcheverry*, 993 P.2d at 375-76 ("The EPA's postregistration consideration of efficacy") *with* Pet. App. at 2a ("the EPA does not regulate herbicide labels regarding how well a product works").

Respondents also argue, consistent with the opinion below – but contrary to *Etcheverry*, *Andrus*, and other cases – that there can be no pre-emption under § 136v(b) without an EPA regulation imposing specific labeling requirements on a particular subject (e.g., efficacy, phytotoxicity); that the "efficacy data waiver" is a statutory exception to § 136v(b);

and that EPA's determination not to normally require submission of efficacy data at the time an agricultural pesticide is first registered negates the pre-emptive effect of § 136v(b). Opp. at 12-14.[5] These too are key points in dispute between the Texas and California supreme courts, and between the Texas Supreme Court and the Fifth Circuit, which only this Court can resolve.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[5] Respondents, like the Texas Supreme Court, are adamant that there is no express pre-emption under § 136v(b), but fail to consider implied conflict pre-emption. *See* Pet. at 22 n.8.

APPENDIX

APPENDIX

THE TEXAS CONSTITUTION

Article 5 – JUDICIAL DEPARTMENT

Section 6 – COURTS OF APPEALS

(a) The state shall be divided into courts of appeals districts, . . . Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

* * *

(c) All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals. (Amended Aug. 11, 1891, Nov. 7, 1978, Nov. 4, 1980, Nov. 5, 1985, and Nov. 6, 2001).